

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



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**75-1362**

To be argued by  
KENNETH J. KAPLAN

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P/S

**United States Court of Appeals  
FOR THE SECOND CIRCUIT**

**Docket No. 75-1362**

UNITED STATES OF AMERICA,

*Appellee,*

—against—

ROBERT HOLT,

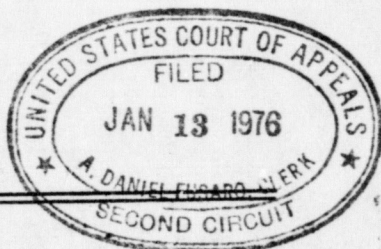
*Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

**BRIEF FOR THE APPELLEE**

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**United States Court of Appeals**  
**FOR THE SECOND CIRCUIT**

**Docket No. 75-1362**

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UNITED STATES OF AMERICA,

*Appellee,*

—against—

ROBERT HOLT,

*Appellant.*

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**BRIEF FOR THE APPELLEE**

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**Preliminary Statement**

Robert Holt appeals from a judgment entered in the United States District Court for the Eastern District of New York (Weinstein, J.) on October 10, 1975, after a jury trial, which convicted him of (1) knowingly receiving, concealing and facilitating the transportation of quantities of cocaine and heroin, between January 1969 and May 1971, knowing the same to have been imported and brought into the United States contrary to law in violation of 21 U.S.C., § 173 and § 174 (Count Two); (2) knowingly possessing with intent to distribute quantities of cocaine and heroin, between May 1971 and December 1972 in violation of 21 U.S.C., § 841(a)(1) (Count Three); and (3) knowingly and intentionally distributing quantities of cocaine and heroin, in violation of 21 U.S.C., § 841(a)(1) (Count Four).<sup>1</sup> Appellant was sentenced

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<sup>1</sup> Appellant was found not guilty of conspiring to receive, conceal, buy, sell, facilitate the transportation of, possess and distribute narcotic drugs (Count One).

on October 10, 1975 to a term of imprisonment of ten years on each count and a special parole term of five years on each count, to run concurrently. Appellant is free on bail pending this appeal.

On appeal, appellant does not challenge the sufficiency of the evidence. Rather he claims that: 1) intercepted telephone conversations between appellant and a major drug trafficker, Ernest Solomon, were improperly admitted into evidence; 2) appellant's statements to law enforcement agents and before the grand jury should have been excluded from evidence; 3) the trial court erred when appellant was denied an opportunity to obtain an expert medical witness in response to an expert called by the Government in rebuttal; and 4) the cumulative effect of improper statements made by the prosecutor during the course of the trial and in summation resulted in substantial prejudice to appellant, requiring a new trial.

### Statement of Facts

Appellant Robert Holt, during the period covered by the indictment, was a police officer employed by the New York City Police Department, and continued to serve in that capacity until he was suspended in May, 1975, following his indictment (894).<sup>2</sup> During the years in question, 1969-1972, appellant abused the power and influence of his official position, and in the process operated as lawlessly as any common criminal. Appellant served as a "protection man" for a large narcotics operation for which he received payment in money and drugs, carried drugs for the operation, using his position as a police officer to assist in the delivery of drugs between members of the operation, and personally

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<sup>2</sup> Numbers in parentheses refer to pages of trial transcript.

possessed, distributed and used narcotic drugs on a regular basis.

#### **A. The Government's Case**

The Government called as principal witnesses a number of individuals who were associated with appellant in the sale or the use of narcotic drugs. Dickie Diamond and McArthur Egister, major narcotics dealers, testified about the nature and extent of the "protection" which they received from appellant. Barbara Britton, Robert Taylor and Clifford Ziegler, all cocaine users, testified that appellant possessed, distributed and used cocaine. The Government also introduced into evidence a tape recording of an intercepted telephone conversation between appellant and Ernest Solomon, still another major narcotics trafficker. Finally, certain inculpatory statements made by appellant were introduced into evidence through the testimony of Special Agent Martin Maguire of the Drug Enforcement Administration and through appellant's own grand jury testimony.

The extensive nature of appellant's corrupt activities were graphically described by Dickie Diamond, a "captain" in the narcotics enterprises of Elvin ("Big Al") Bynum (175-177). Diamond testified that he was first introduced to Holt in late 1968 by Bynum, as a police officer on the organization's payroll, and as one who could be counted on to provide protection (180-181). Diamond had his own narcotics business and proceeded to employ Holt at \$50 a week to provide him with protection and intelligence information (186-187). Early in 1969 appellant started "riding shotgun"<sup>3</sup> for Diamond

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<sup>3</sup> "If a policeman rides shotgun with you and you're stopped by the law, he can flash his badge. Nine out of ten times they won't search the car or think there are criminal activities going on in the car" (189).

by accompanying him frequently in the delivery of narcotics (188-189). Most of the time appellant carried the packages, which contained as much as one-half kilogram of heroin or cocaine, on his person (205). Diamond paid appellant approximately \$100 for each "shot-gun ride," and supplemented this with payments of approximately \$100 a week (191, 201). In addition, Diamond gave Holt clothing on three or four occasions, and \$500 towards the purchase of the car of "Cadillac Bob," a recently deceased narcotics dealer (195). Finally, in 1969 appellant advised Diamond that he "snorted" cocaine and asked for narcotics for himself and his girlfriend. Diamond estimated that during the period between 1969 and 1971 he gave Holt approximately \$25,000 to \$30,000 in heroin and cocaine (218).

On certain occasions appellant provided Diamond with confidential police information. Thus, when two employees of the Bynum organization, "Richard" and "Quinn," were arrested, Diamond asked Holt to learn if they had become informers. Holt discovered that Richard may have become an informant for the police department, and as a result of this information Richard was physically "shaken up" (193-194). On another occasion Holt informed Diamond that his name had "come up" in the "Help the Junky, Bust the Pusher" program. Appellant's advance information enabled Diamond to leave town for a discrete period of time (213-214). Diamond and his "Lieutenant", McArthur Egister, were also advised that an after-hours place, the "623 Club", was going to be "busted," thus enabling Diamond and Egister to avoid a possible arrest (406).

The testimony adduced also indicated that Diamond and Egister were present in a bar when appellant showed

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<sup>4</sup> Snorting is a "street term" denoting the sniffing <sup>of</sup> the substance into one's nostrils.

them some narcotics in a glassine bag and described to them how he intended to "flake"<sup>5</sup> someone in order to meet his "quota" (214-217, 394). Egister also testified that he observed appellant pass cocaine around in various bars in Bedford-Stuyvesant (410), and, in one instance, he also observed Holt snort cocaine in the Baby Grand Bar (408).

Through various other witnesses, it was shown that appellant possessed, distributed and used cocaine between 1969 and 1972, often in the bars and social clubs of Bedford-Stuyvesant, but also in bathrooms and in cars. Robert Taylor, a professional photographer, testified that when he first met appellant in the summer of 1969 appellant attempted to "shake him down" (17-20). Holt's attitude towards Taylor later changed, after a mutual friend apparently interceded (24-25). In August, 1971, Taylor testified that he met appellant in the Blue Coronet Bar, and that Holt offered Taylor a "blow" of cocaine in the bathroom. Holt produced an aluminum foil packet containing cocaine and together they proceeded to snort the drug (26-27). On other occasions Holt saw Taylor in the Blue Coronet and was again offered cocaine by appellant. Taylor was never arrested by Holt; nor did he recall ever seeing anyone else arrested by Holt in the Blue Coronet (33).

Barbara Britton, the barmaid in the Blue Coronet, worked with Lillian Day, Holt's paramour. She testified that on various instances she and appellant exchanged cocaine in the vicinity of the Tip Top Bar (112). She often snorted cocaine with Lillian Day in the ladies room of the Blue Coronet during the years 1968-1970 (114). On one occasion during the summer of 1971,

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<sup>5</sup> "Flaking" is a "street" term used to indicate that a policeman will plant contraband on a citizen (216).

Britton and Holt went from the Blue Coronet to Holt's car, across the street from the bar. Inside the car appellant produced a medicinal jar half-full of cocaine, whereupon both appellant and Britton proceeded to snort his cocaine (110). Still another time Britton and Holt snorted Britton's cocaine inside appellant's car (112).

Clifford Ziegler, a neighborhood associate of the appellant, also described snorting cocaine with appellant. In April, 1972, they both snorted appellant's cocaine in the bathroom of the Tip Top Bar. Apparently appellant possessed about an eighth of an ounce of cocaine in a tin foil, which he offered to Ziegler (450-452). In August, 1972 they also met in the bathroom of the same bar and snorted cocaine from a package of equivalent size (453-454). At other times from 1969 through 1972 Ziegler observed appellant sharing cocaine with a woman while inside an automobile (460-461).

On December 17, 1974, appellant was asked to appear in the office of Assistant United States Attorney Kenneth Kaplan in the United States Courthouse for the Eastern District of New York. Present at the meeting on that day were appellant, Kaplan, Drug Enforcement Administration Agents Martin Maquire, Richard Moser and Daniel Martin and Assistant United States Attorney Richard Appleby (607). Appellant was advised that he was a target of a police corruption investigation and advised of the allegations in general terms (608). After appellant denied allegations of wrongdoing Agent Moser advised him of his constitutional rights (609). Appellant indicated that he understood his rights and consented to be interviewed (611-612). Appellant stated that he knew narcotics dealers Bynum, Diamond, Frank Matthews, and others "socially" (611). He said that he was a friend of Bynum, and

that he was aware that Bynum was a major narcotics dealer. From time to time he borrowed money from narcotics dealers, but always paid it back. In addition, he stated that

in Bedford Stuyvesant . . . he ran into a lot of those drug dealers and they would ask him particular questions pertaining to their legal cases pending in State or Federal Court and that he would advise them as to the different questions they had on the law.

He said in return for this they would give him small amounts of cocaine to show their appreciation (612).

When asked if he knew if this was illegal, and whether he vouchered the cocaine, appellant stated that he "didn't want to insult them" so he gave the cocaine to his girl friend Lillian Day. He said that he received cocaine on some twenty occasions, and that he knew it was illegal (613). He added that he was not investigating any of these narcotics dealers, and that he was not operating in an undercover police capacity (615-617). Moreover he did not report any of these activities. When asked to enumerate which dealers had given him cocaine on twenty occasions, appellant said that he didn't remember (616). Appellant denied any other corrupt activities, and denied the use of narcotic drugs. Finally he said that as a police officer it was his job to cooperate with the United States Attorney (617). He was given a grand jury subpoena and advised to appear again on December 27.

On December 27, a meeting was held in the same office at which all of the same individuals were present. Again appellant was advised that he was a target of investigation. He was asked if he had known Ernest Solomon, who was then deceased. Holt said that Solomon offered him \$50,000 to go to South America to pick up narcotics

for him, but he indicated he turned the offer down (618-619). He said that he knew Solomon was a major narcotics dealer, but denied ever having a telephone conversation with him, or asking Solomon for narcotics (619). A tape recording was then played for Holt.<sup>6</sup> The tape recording juxtaposed two short telephone conversations between Solomon and Holt. The first conversation, which took place on October 1, 1971, involved a request by appellant ("Bob") of Solomon ("Ernie") to bring him "the big one," "tonight." The second conversation, on October 4, 1971 involved the failure of Solomon to meet Holt as requested in the first conversation.<sup>7</sup>

After being confronted with the tape recording at the December 27th meeting appellant acknowledged that the conversation was indeed between himself and Solomon. When questioned about the meaning of the "big one" appellant stated that it referred to "two spoons of cocaine" that he was getting for his girlfriend.<sup>8</sup> Appellant also stated that in return for the cocaine he was asked by Solomon to learn whether Solomon's telephone was tapped, although he (Holt) had no intention of doing so (620-622, 631).

On December 27, 1974, appellant voluntarily appeared before the grand jury.<sup>9</sup> At the outset appellant was fully

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<sup>6</sup> The tape recording was introduced into evidence at the trial and played for the jury (Ex. 23, 626). The transcripts of the recording were also introduced into evidence (Ex. 20, Ex. 20(a)).

<sup>7</sup> Apparently Solomon was sick and wasn't able to bring the "big one" as scheduled.

<sup>8</sup> Agent Maguire testified: "I said, 'Come on Bob. You don't talk to a major narcotics dealer on the phone for two spoons of cocaine.' He said, 'That's all I can tell you—two spoons of coke I was going to give to Lil'" (621).

<sup>9</sup> Appellant's grand jury testimony was marked in evidence (Ex. 24) at the trial and distributed to the jury. Page references to the grand jury testimony are preceded by "G".

advised of his constitutional rights, and informed that he was "the subject" of an investigation presently being conducted by a Federal Grand Jury for the Eastern District of New York (G2-4). Appellant, an experienced law enforcement officer for many years, expressed full knowledge of his rights, and expressly waived them. He also signed a waiver of immunity from prosecution form (Ex. 22; G4).

In the grand jury appellant testified that he knew Bynum, Diamond, Solomon and other major narcotics dealers, and that he had had conversations with them subsequent to learning about their activities (G13-19, G26-28). When asked if he ever received cocaine from Diamond, appellant responded that he couldn't remember (G31). He testified that he possessed cocaine and gave it to his girlfriend Lillian Day on some ten to fifteen occasions, during the years 1971 and 1972 (G32-33). However, he couldn't enumerate the names of the people from whom he received the narcotics. He further testified that these occasions were not in the performance of his official police duties. And he said that he knew he had unlawfully possessed a narcotic drug in violation of both state and federal law (G33-34).

Appellant also testified before the grand jury that he "received a promise" from Solomon to give him two spoons of cocaine but that Solomon never delivered. Appellant acknowledged the taped conversation mentioned hereinabove and testified that he wasn't going to pay for the cocaine (G44-45, 654-55). Finally he testified that he was not investigating any of these narcotics dealers and that he had received cocaine from them as a gift given apparently because he was a police officer (G46, G55).

## **B. The Defense Case**

Appellant testified at trial on his own behalf. He described his career and assignments with the New York City Police Department, his commendations and his demotion from detective to uniformed officer. Appellant denied that he had ever illegally possessed or distributed narcotics, or that he had provided protection or police information to narcotics dealers. He admitted that he knew Bynum, Diamond, Solomon and other narcotics dealers, but stated that they were not his friends.

Appellant testified that after he "refreshed his recollection" he recalled that the conversation with Solomon ("the big one") related to a "ticket to a fight" and not to cocaine, although he had some recollection of having a conversation with Solomon about cocaine on another occasion (739, 807, 809, 889). Appellant explained that in so far as he previously admitted the possession of cocaine on ten to fifteen occasions, those actions were related to an undercover police operation concerning Brooklyn CORE in 1967. He testified that he received narcotics in the street and gave them to his girlfriend to flush down the sink (743-746). However, appellant did not explain the discrepancy between the dates in his grand jury testimony (1971-1972) and this purported 1967 investigation, nor did he state why he omitted to offer this explanation before the grand jury, where he admitted that he possessed the narcotics in violation of law (900-904, 908).

The defense also called Phillip Denny, an associate of Ernest Solomon, to testify. He stated that he recalled a conversation between Solomon and Holt regarding fight

tickets (679). Denny had been arrested with Solomon in 1971 and charged with the conspiracy to distribute cocaine in a case involving Solomon and Raymond Ellington, another police officer (681). Denny also testified as a character witness for appellant.

Carol Scott, formerly a barmaid in the Blue Coronet Bar testified that she never gave narcotic drugs to appellant. When asked on cross-examination if she had ever told federal officials in June, 1975 that she knew Holt was a cocaine user, she stated that she "didn't remember" (840-843).

Finally, the defense called many character witnesses to the stand. A number of these witnesses, police officers, were asked if they were sufficiently familiar with the symptoms and manifestations of cocaine abuse to enable them to detect whether appellant had regularly used cocaine. They testified that based upon their experience and observations they believed that appellant was not a cocaine user. Some of the witnesses admitted, however, that the effects of cocaine use were transient and difficult or impossible to detect a few hours after use (984, 1047).

### **C. The Rebuttal Case**

In response to defense testimony treating the purportedly discernible effects of cocaine use, the Government called Dr. Michael Baden to testify in rebuttal. Dr. Baden, a physician, is Deputy Chief Medical Examiner of the City of New York and Associate Professor of Forensic Medicine at New York University School of Medicine (1074-1077). Dr. Baden testified that if a person snorted cocaine a few times a week for five or six years there would be no discernible, outward signs of cocaine use which even a qualified specialist could notice.<sup>10</sup> He stated

<sup>10</sup> The hypothetical posed to Dr. Baden assumed that the individual was not presently under the influence of cocaine, but was being observed a few hours after snorting (1080-1081).

that only an internal examination of the nose by a qualified specialist could conceivably disclose cocaine use, and even that detection by a qualified medical expert was unlikely (1080-1082). Dr. Baden further testified that a police officer trained in narcotics enforcement would not be able to make such a determination by an external inspection and observation (1982).

## ARGUMENT

### POINT I

**The wiretap conversations between appellant and Ernest Solomon were properly admitted into evidence.**

Appellant contends that the tape recorded conversations between himself and Ernest Solomon should have been excluded because the order authorizing the electronic surveillance warrant failed to contain a minimization provision. This claim was raised by appellant prior to trial and properly rejected by Judge Weinstein,<sup>11</sup> on the ground that appellant lacked the requisite standing to object that the telephonic interception was defective for failure to minimize (17A-18A of transcript 1A, August 18, 1975).

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<sup>11</sup> Appellant's furtive suggestions that this court-ordered wiretap was somehow tainted by the convictions of Detectives McClean, Viera and Codelia were also summarily dismissed by the trial court. Appellant could provide no evidence of illegality relating to this wiretap. The three police officers were convicted of wiretapping without warrants, *inter alia*, while the instant case involved a court-ordered warrant based upon reliable informant information which was supervised throughout the investigation by Assistant District Attorney Vincent Fay (Fay Deposition 8-42).

A court ordered surveillance of Ernest Solomon's telephone at 91 Ocean Parkway intercepted numerous conversations between Solomon and individuals in his narcotics organization.<sup>12</sup> Throughout the operative period of the wiretap, two calls were intercepted involving conversations with appellant, the aforementioned October 1st and October 4th conversations. Appellant did not have any proprietary interest in 91 Ocean Parkway or in the telephone that Solomon used. It is, therefore, apparent that appellant lacks standing to challenge the failure to include a minimization provision in the order, and any failure to minimize the interception. For purposes of contesting minimization, appellant is not an "aggrieved party," having no privacy interest in the subject telephone. This Court's decision in *United States v. Poeta*, 455 F.2d 117, 122 (2d Cir. 1971), *cert. denied*, 406 U.S. 948 (1972) is directly in point. In *Poeta*, the defendant objected to the admission into evidence of conversations between himself and his co-conspirator, Stepenberg, which were overheard pursuant to a wiretap on Stepenberg's telephone. Poeta claimed that the failure to minimize conversations seized from Stepenberg's telephone required suppression of his conversations on that line. Judge Lumbard, writing for the Court, flatly held that since the "tap was on Stepenberg's telephone, not Poeta's . . . Poeta lacks standing to contest any such invasion of Stepenberg's rights." 455 F.2d at 122. In reaching this conclusion this Court relied upon *Alderman v. United States*, 394 U.S. 165, 175 n.g (1969). Only those persons whose premises were subjected to illegal electronic surveillance have standing to object to the admission of the overheard conversations. See also *Sisca v. United States*,

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<sup>12</sup> After a long hearing in the State Supreme Court, Kings County, the Court (Scholnick, J.) held that the failure to minimize would result only in the suppression of non-relevant conversations. *People v. Solomon*, 348 N.Y.S. 2d 673, 676 (S. Ct. 1973).

503 F.2d 1337 at 1348, n. 15 (2d Cir. 1974), *United States v. Bynum*, 513 F.2d 533, 535 (2d Cir. 1975),<sup>13</sup> *United States v. Hinton et al.*, — FS — (75 Cr. 72, EDNY).

Appellant cites a number of Second Circuit cases in which co-conspirators litigated the minimization issue: *United States v. Bynum*, 485 F.2d 490 (2d Cir. 1973); *United States v. Tortorello*, 480 F.2d 764 (2d Cir. 1973); *United States v. Manfredi*, 488 F.2d 588 (2d Cir. 1973); *United States v. Rizzo*, 491 F.2d 215 (2d Cir. 1974); and *United States v. Cirillo*, 499 F.2d 872 (2d Cir. 1974). In none of these cases was the issue of standing raised. Conceivably the co-conspirators had some proprietary interest in the telephone in question, or the Government chose not to contest the issue of standing since the hearing on minimization would have to be conducted anyway.

But even assuming that appellant had standing in the instant case to challenge on minimization grounds, his claim would still fail on its merits. Appellant conspicuously avoids mention of the State Supreme Court decision where the same issue of minimization was raised by Solomon. *People v. Solomon*, 346 N.Y.S. 2d 938, 941 (S. Ct., 1973). The failure to include the minimization provision was held to be nothing more than a "de minimus oversight" which would not affect the validity of the warrant. The *Solomon* opinion was cited with approval in *United States v. Manfredi*, 488 F.2d 588, 598 (2d Cir. 1973) where the Court held that wiretap orders are not necessarily vitiated "by virtue of omission of the talismanic minimization language."<sup>14</sup> In addition, the mere

<sup>13</sup> In *United States v. Bynum*, *supra*, for example, Bynum's paramour was held to have standing because she lived in Bynum's residence, but the other co-conspirators, failing some proprietary interest, lacked such standing.

<sup>14</sup> The Court in *Manfredi* recognized that the question of the facial validity of the warrant is "to be determined by reference to state law." 488 F.2d at 598.

fact that every conversation is monitored does not render the surveillance violative of the minimization requirement of the statute. *United States v. Bynum*, *supra*, 485 F.2d at 500; *United States v. Manfredi*, *supra*, 488 F.2d at 599.

Moreover, under no circumstances can the failure to minimize<sup>15</sup> be said to prejudice the rights of appellant. Only two of the intercepted calls involved appellant, and with respect to both of these, the conversations were properly interceptable anyway since they dealt with the subject matter of the narcotics investigation, and were therefore well within the scope of the order. Both conversations involved discussions in a veiled, discrete manner, where reference was made to "that thing," "anything," and "the big one," well known to experienced law enforcement officials as narcotics lingo. It seems clear that even if a minimization requirement is not complied with, only those conversations outside the scope of the order will be suppressed. *United States v. Cox*, 462 F.2d 1293 (8th Cir. 1972); cf. *United States v. Bynum*, 485 F.2d 500 (2d Cir. 1973). Thus, even assuming that appellant had standing to raise the failure to minimize—an assumption we do not make—the defect would be of no consequence.

## POINT II

**Appellant's oral admissions and grand jury testimony were not admitted into evidence in violation of Rule 11(e)(6) of the Federal Rules of Criminal Procedure.**

Appellant contends that pursuant to Rule 11(e)(6), F. R. Cr. Pr., his oral admissions to law enforcement

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<sup>15</sup> There is no evidence that there was a complete failure to minimize.

agents, and his grand jury testimony should have been excluded from evidence. Appellant argues that his statements on December 17 and December 27, 1974 were somehow "a plea of guilty," "an offer to plead guilty" or "statements made in connection with, and relevant to, any of the foregoing pleas or offer," and therefore fall within ambit of this rule. Even assuming that Rule 11 (e) (6) somehow applies to admissions made in the offices of the United States Attorney, as well as in a Court—an assumption which we do not accept, but need not argue today in view of the District Court's findings—the evidence adduced at a suppression hearing, at trial, and at a subsequent hearing clearly established, and the Court explicitly found that no offer to plead guilty was made to, or accepted by appellant on December 17 or December 27, 1974. Judge Weinstein explicitly found that "... neither Rule 410 of the Federal Rules of Evidence, nor Rule 11 of the Federal Criminal Rules applies. And neither under these rules or under the common law is there any necessity to exclude the statements as having been made during the plea-bargaining negotiations. There was none at this time" (596).

A review of the testimony concerning the December 17th and December 27th meetings in the United States Attorney's Office amply supports the Court's factual finding that no offer to plead was made or accepted on December 17 or December 27, 1974. According to the testimony of Agents Martin, Maguire and Assistant United States Attorney Kaplan, appellant was asked to appear in Kaplan's office on December 17, 1974. He was advised that he was a target of a police corruption investigation and apprised of his alternatives; he could be indicted and fight the case, or he could fully cooperate with the Government and perhaps be accorded the opportunity of receiving a lesser plea and reduced sentence (K. 11,<sup>16</sup> 17,

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<sup>16</sup> Numbers preceded by "K." refer to testimony adduced at a post-trial hearing held on October 23, 1975.

524, 570-571, 595). At no time was an offer of a specific plea made to appellant, nor did appellant negotiate for any particular plea (K. 13).

In the absence of appellant's cooperation at the December 17th meeting he was advised of his constitutional rights and interrogated, and at that same meeting he was given a subpoena to appear on December 27, 1974, a fact hardly suggesting that any plea had been offered or accepted. On December 27th appellant was again advised that he was a "target" of investigation. Appellant's continuing lack of candor provoked comment from the individuals present that he was not believed, and was not cooperative (K. 12, 526, 531). After the December 27th meeting, appellant was asked to appear before the grand jury, where he was given his full *Miranda* warnings, and voluntarily executed a waiver of immunity from prosecution form. In addition, he was advised that he was the subject of an official corruption inquiry (G. 1-G. 4). The rigorous cross-examination appellant was subjected to in the grand jury further illustrates that appellant was not considered a cooperating witness who had been offered a "lesser plea."

Appellant's testimony at the suppression hearing most persuasively supports the conclusion that no offer was made or accepted. When questioned by the Court as to any possible plea of guilty, appellant categorically denied them:

. . . Now, Mr. Holt, were you offering to plead guilty at this time to anything?

The Witness: No sir.

The Court: Was there any intention in your mind that you might plead guilty to anything?

The Witness: Not at all, sir. (558)

In sum, each witness present at these meetings testified that no plea, offer to plea or statements in connection with a plea took place.<sup>17</sup> Based upon all of the evidence adduced the Court made the following finding:

. . . The Court finds that there were no offers to plead or accept a plea of guilty. This finding is based upon the statements of the defendant himself, who stated in answer to the Court's questions that he was not giving information on the assumption that he was negotiating for a plea of guilty or not guilty. That's confirmed by the witnesses. There was no offer to plead and this was in no way negotiation with respect to a plea. (596)<sup>18</sup>

The Court further found that appellant's statements were all voluntarily given after *Miranda* warnings. Since these findings are amply supported by the record, they should not be disturbed. *United States v. Boston*, 508 F.2d 1171, 1175 (2d Cir. 1974); *United States v. D'Avanzo*, 443 F.2d 1224, *cert. denied*, 404 U.S. 850 (1970); *Campbell v. United States*, 373 U.S. 487 (1963); *Jackson v. United States*, 353 F.2d 802 (D.C. Cir. 1965); Rule 52(a), F. R. Civ. Pr.

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<sup>17</sup> Sergeant Blackshear corroborates the Government by testifying that Holt advised him that ". . . he was called in [to the United States Attorney's Office] and that there was a possibility of him being indicted and that he said he had talked to the attorney and the attorney said he could *possibly* plead to a lesser plea" (K. 6) (emphasis added).

<sup>18</sup> Appellant refers in his brief (p. 22) to Assistant United States Attorney Kaplan's statement regarding Holt's *later* cooperation with the United States Attorney's Office (in producing a witness in another prosecution). This statement in no way relates to anything that transpired on December 17 or December 27th, but to activities some months later. At no time did the Government seek to offer any testimony relating to an acceptance of a plea by appellant or plea negotiations.

Moreover, appellant cites no authority for the proposition that the mere discussion of a possibility of a lesser plea brings a statement within the purview of Rule 11(e)(6). The history of Rule 11 and the advisory notes relate to plea agreements, not to situations where a prospective defendant is apprised of his alternatives. See 2 [Weinstein's Evidence] 401 [01], et. seq. The statements admitted into evidence cannot be attributed in any way to the fruits of a plea arrangement. They were made in response to specific charges which the appellant at first denied (e.g. the Solomon conversation) and then admitted during the course of an interrogation.

### POINT III

#### **Appellant was given a reasonable opportunity to obtain expert medical testimony.**

Appellant argues next that he was denied a reasonable opportunity to obtain an expert medical witness in response to the expert called by the Government on its rebuttal case. A review of the record, however, amply establishes that appellant had every reasonable opportunity to call any witness, or introduce any evidence that he wished.

Prior to, and many times during the course of the trial, the Government, anticipating that the defense might adduce some type of medical testimony, moved pursuant to Rule 16(b) for any materials relating thereto (see p. 661).<sup>19</sup> At no time did defense counsel advise the Court or the Government that he intended to adduce any medical testimony. Nevertheless, on the final day of trial, August 22nd, the defense called a number

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<sup>19</sup> The defense received all of appellant's medical records in the possession of the Government at the time of trial.

of police officers who testified that based upon their training and experience in the narcotics field, they were able to discern the observable symptoms of snorting cocaine, and further, that they did not observe any signs of narcotics use by appellant.

The relevance of such testimony was remote at best, in view of the fact the Government never maintained that the appellant was an addict, but simply that he snorted cocaine occasionally. However, in view of the extensive testimony adduced, the Government felt obliged to rebut this testimony.<sup>20</sup> Late on Friday afternoon, August 22, 1975, the Government was able to contact Dr. Michael Baden, Deputy Chief Medical Examiner of New York City, and have him appear as a witness. After Dr. Baden testified, the Court gave the defense every reasonable opportunity to offer rebuttal testimony, whether by witness or by treatise in lieu of live testimony (1105). The Court gave the defense from Friday to Monday to obtain a witness, and when the defense asked for more time, the Court afforded the defense the opportunity to call an expert witness *after* summations and charge, and before the case went to the jury (Monday afternoon). The defense never produced a witness at any time, nor indeed even indicated that a witness would appear at any specific time (1113). Nevertheless, the Court permitted counsel to argue that there were experts who differed with Dr. Baden's views, and included a jury charge that there were "contrary views" to Dr. Baden's even though the defense had failed to adduce a single piece of evidence, in any form, that Dr. Baden's expert opinion was seriously controverted. Indeed, Judge Weinstein's generous charge as to "contrary views" in the medical profession may have

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<sup>20</sup> The Court said to defense counsel, "What do you expect the Government to do. You know enough about drugs to know that a good deal of that testimony was nonsense" (1973).

afforded the defense more than it could even have proven by witness or treatise (1114, 1284). The Court could hardly have been more indulgent with the defense, especially in view of the fact that the appellant had opened the door to the medical issue in the first place, and thus could hardly claim surprise when the Government controverted it.

It is well settled that a motion for a continuance is directed to the sound discretion of the trial court. Absent a clear abuse of discretion, appellate courts have been loath to reverse a trial court's denial of a continuance. *Avery v. Alabama*, 308 U.S. 444 (1940); *United States v. Bentvena*, 319 F.2d 916 (2d Cir.), cert. denied, *Ormento v. United States*, 375 U.S. 940 (1963); *United States v. Earley*, 482 F.2d 53 (10th Cir.), cert. denied, 414 U.S. 111 (1973). There is no showing that appellant suffered the slightest prejudice from the trial court's rulings.

#### POINT IV

##### **There is no evidence of prejudicial comments by the prosecutor on summation or cross-examination.**

Appellant complains that the "cumulative effect" of statements made by the prosecutor during the course of the trial and in summation resulted in substantial prejudice. Specifically appellant contends: 1) that the prosecutor asked two improper questions concerning whether appellant had ever been "charged" with any violations by the Police Department during his police career; 2) that the prosecutor asked improper questions on cross-examination of character witnesses; 3) that the prosecutor made improper comments on summation; and 4) that the prosecutor made "unfair comment" concerning the defense's failure to call appellant's girlfriend,

Lillian Day, as a witness. (pp. 30-33, Appellant's Brief). Appellant does not cite any authority to support his contentions, nor does he indicate what prejudice he suffered.

Appellant first takes issue with two questions asked by the prosecutor concerning the "specifications and charges" police officer Holt experienced during his police career. Neither of these questions were answered by appellant (785, 793). It is submitted that this inquiry was a wholly proper response to the lengthy and detailed testimony of appellant on direct examination, wherein he presented himself to the jury as a distinguished police officer<sup>21</sup> (691-708). Appellant testified as to awards and commendations which he obtained as a police officer. In addition, he presented an explanation for his demotion from detective to police officer in 1970, which formed the basis for the charges and specifications referred to on cross-examination. Since his portrayal to the jury of the 1970 incident was hardly credible ("I was demoted because I was stuck up". 706), cross-examination into this area was appropriate in order to indicate that appellant had minimized egregious official activity.<sup>22</sup> Nevertheless, since these questions were never answered, and the second question was withdrawn by the prosecutor, it cannot be said that appellant was prejudiced in the least.

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<sup>21</sup> Through five pages of testimony, having no relevancy to the instant case, appellant described an incident in which he was wounded in 1964 (695-700).

<sup>22</sup> On cross-examination it developed that appellant was held captive in an "after-hours club" at 2:30 A.M., after having spent time in a car with Willie Martin, a man with a criminal record (790-792). Mr. Holt's revolver was taken and used in a homicide the next day (706).

Appellant further contends that improper questions were posed to character witnesses. Some of these witnesses were asked if they had heard that Mr. Holt was "shaking down numbers runners and prostitutes" (974-975, 1018, 1056). The Government advised the Court that it had based these questions on information supplied by witnesses who would testify that appellant was indeed shaking down numbers runners and prostitutes (975). It is well settled that a character witness may be cross-examined on whether he has heard of any particular instance of conduct or misconduct pertinent to the trait in question. Rule 405, Federal Rules of Evidence and Advisory Committee's Note; *Michaelson v. United States*, 335 U.S. 469 (1948). In the *Michaelson* case, the Supreme Court defined the scope of appropriate cross-examination:

. . . [The character] witness is subject to cross-examination as to the contents and extent of the hearsay on which he bases his conclusions, and he may be required to disclose rumors and reports that are current even if they do not affect his own conclusion. [The prosecution] may test the sufficiency of his knowledge by asking what stories were circulating concerning events, such as one's arrest, about which people normally comment and speculate. 355 U.S. at 499).

The character traits that appellant had sought to elicit through character testimony were "truthfulness," "honesty," and "reputation for lawfulness" in the police community. Many witnesses were asked by appellant if they had ever heard anything "bad" about appellant. Surely an inquiry relating to whether they heard that he had abused his office was appropriate. It was therefore proper for the trial court to permit the appellant to be asked "whether the witness 'had heard' of the disparaging rumors as 'negating the reputation' ". *United*

*States v. Bermudez*. — F.2d — (2d Cir. Nov. 6, 1975), Slip Op. 441, at 447. See also *United States v. Silverman*, 430 F.2d 106, 125-26 (2d Cir.), *cert. denied*, 402 U.S. 953 (1970).

Furthermore, a question posed to witness Rivera, an attorney—whether he had heard that Lillian Day, appellant's girlfriend, took Holt's revolver and shot at him (1056)—was intended to probe the witness' knowledge of appellant's reputation. Since Mr. Rivera described Holt as a personal friend and knew him well socially, this question sought to demonstrate the limited knowledge of the witness of the appellant's reputation by the fact that he was unaware of an incident well-known in the community.

Appellant next argues that the Assistant United States Attorney made prejudicial comments during summation. To support this claim, appellant cites four short statements<sup>23</sup> from a summation which occupied forty-five pages of transcript. Nowhere in the prosecutor's summation is there the slightest suggestion of inflammatory statements, *ad hominem* attacks on appellant, assertion of personal beliefs, or statements unsupported by the record. In addition, the prosecutor did not bolster the Government's case by placing the prestige of the United States behind a witness or by vouching for a witness' credibility. In short, none of the statements complained of herein, even remotely approaches the comments found objectionable in this Court's prior decisions on prosecu-

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<sup>23</sup> The comments were these: 1) "[T]his is incredible" (1222); (2) "a ridiculous explanation" (1231); "... if you look at Mr. Holt's testimony you will see the lengths to which Mr. Holt went to fabricate events, associations and the admission he made to Mr. Maguire in (sic) the grand jury to get out, again, from under an overwhelming case" (1250); (4) "[A]gain an opportunity [for appellant] to fabricate some fantastic story to conform to some event years before" (1256). See *United States v. Gottlieb*, 493 F.2d 987, 994 (2d Cir. 1974).

tor's summations. See *United States v. Puco*, 436 F.2d 761 (2d Cir. 1971); *United States v. Drummond*, 481 F.2d 62 (2d Cir. 1973); *United States v. LaSorsa*, 480 F.2d 522, 526 (2d Cir. 1973); *United States v. White*, 486 F.2d 204, 205-207 (2d Cir. 1973); *United States v. Fernandez*, 480 F.2d 726, 741 n.23 (2d Cir. 1973).

In the instant case the prosecutor "did no more than recapitulate [the defendant's] testimony and argue why it was not to be believed." *United States v. DeAngelis*, 490 F.2d 1004 (2d Cir.), *cert. denied*, 416 U.S. 956 (1974).

It is the accepted and proper purpose of summation to make such arguments regarding the purpose and credibility of any witness so long as there is sufficient support therefore in the record before the jury. 490 F.2d at 1008

The portions of summation cited by appellant as evidence of improper comment in fact constitute altogether permissible argument about reasonable inferences to be drawn from evidence adduced. At another point where appellant objected to a part of the summation not raised herein, the Court stated to the jury:

It is clear that in both your [Mr. Pascarella's] arguments and Mr. Kaplan's arguments the jury is being asked to infer things from the record.

It is also noteworthy that at no time were any of these allegedly prejudicial comments (quoted on p. 32, Appellant's Brief) objected to, either during or after the summation by appellant. Thus, the failure to object constituted waiver of such objection. *United States v. Indiviglio*, 352 F.2d 267, 281 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966).

Finally, appellant contends that prosecutorial comment about the fact that his girlfriend, Lillian Day, was not called to corroborate his testimony constituted error.<sup>24</sup> Again, appellant fails to cite any authority for this proposition. This Court has stated on numerous occasions that a prosecutor may comment upon the defense's failure to call witnesses to contradict the Government's case. *United States v. Lipton*, 467 F.2d 1161 (2d Cir. 1972), *cert. denied*, 410 U.S. 927 (1973); *United States v. Tortora*, 464 F.2d 1202, 1207 (2d Cir. 1972); *United States v. Parness*, 503 F.2d 430, 457, n. 10 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975). It is well established that

It is perfectly proper to comment on the failure of the defense to call a potentially helpful witness, at least where, as here, the comment could not be construed as a comment on the failure of the defendant to testify. *United States v. Keller*, 512 F.2d 182, 186 (3d Cir. 1975.)

Certainly Miss Day could have provided corroboration for appellant's explanation of what happened to the narcotics, and her presence in Court during the trial indicates that she was easily accessible to the defense (98-99).

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<sup>24</sup> Appellant testified in the Grand Jury that he gave Lillian Day narcotics on ten to fifteen occasions. At trial he "amended" this testimony by stating that he had advised her to wash the narcotics down the sink (735-843).

**CONCLUSION**

**The judgment of conviction should be affirmed.**

Respectfully submitted,

January 9, 1976

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# AFFIDAVIT OF MAILING

STATE OF NEW YORK  
COUNTY OF KINGS  
EASTERN DISTRICT OF NEW YORK, ss:

\_\_\_\_\_ KENNETH KAPLAN, ESQ. \_\_\_\_\_, being duly sworn, says that on the 9th  
day of January, 1976, I deposited in Mail Chute Drop for mailing in the  
U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and  
State of New York, a BRIEF FOR APPELLEE  
of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper  
directed to the person hereinafter named, at the place and address stated below:

\_\_\_\_\_ JAMES A. PASCARELLA, ESQ. \_\_\_\_\_

\_\_\_\_\_ ONE OLD COUNTRY ROAD \_\_\_\_\_

\_\_\_\_\_ CARLE PLACE, N.Y. 11514 \_\_\_\_\_

Sworn to before me this  
9th day of Jan. 1976

*Olga S. Morgan*

OLGA S. MORGAN  
Notary Public, State of New York  
No. 24-0000000  
Qualified in Kings County  
Commission Expires March 30, 1977

*Kenneth Kaplan*

